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U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON ENERGY AND NATURAL RESOURCES
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PUERTO RICO STATUS: HISTORY, LAW AND POLITICS

The report of the President's Task Force on Puerto Rico and legislation to implement its recommendations in a manner approved by Congress is imperative to achieve a democratic form of government at the national level for the 4 million U.S. citizens in Puerto Rico.

The self-determination and political status resolution process in Puerto Rico is in a state of arrest, due to the ill-defined and confusing state of federal law and policy concerning Puerto Rico's status options. As a result, Puerto Rico remains the last large and heavily populated U.S. territory living under the anachronisms of America's imperial experiments in the distant past.

There are many here in Washington who promise to respect whatever status choice Puerto Rico chooses, but in the next breath say the problem is we can not make up our minds. Yet, the reason we do not have majority rule in Puerto Rico on the status issue is that Congress has failed to act in accordance with U.S. historical practice and constitutional precedents for territorial status resolution.

Without becoming unduly legalistic, let me say that the political dilemma we face is rooted in fatally flawed federal jurisprudence that has deviated since 1922 from the preceding 135 years of American territorial law going back to the Northwest Ordinance of 1787.

The historical norms for territorial status resolution were:

- Withholding U.S. citizenship and adopting a policy of non-incorporation leading to independence, as in the case of the Philippines, or
- Conferral of U.S. citizenship, triggering application of the U.S. Constitution and incorporation, the result confirmed by the U.S. Supreme Court in the cases of Alaska and Hawaii. *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Rassmussen v. U.S.*, 197 U.S. 516 (1905).

In 1901, the Supreme Court had ruled that Congress could govern the non-citizen populations of the Philippines and Puerto Rico as non-incorporated territories under U.S. nationality without extending the U.S. Constitution. *Downes v. Bidwell*, 182 U.S. 244 (1901) In *Rassmussen*, however, the Supreme Court ruled that territories with U.S. citizen populations were incorporated into the nation, and that the U.S. Constitution applied by its own force consistent with territorial status.

Thus, the Alaska and Hawaii cases on extension of the U.S. Constitution should have been applied to Puerto Rico when Congress extended U.S. citizenship in 1917. Instead, in 1922 a deeply divided U.S. Supreme Court made a fateful error and decided, notwithstanding the conferral of U.S. citizenship, that extension of the U.S. Constitution to Puerto Rico should be left to the discretion of Congress. *Balzac v. Puerto Rico*, 258 U.S. 298.

The Balzac decision was a 5-4 ruling that gave Congress license to govern the U.S. citizens of Puerto Rico in the same manner as non-citizens in non-incorporated territories, without the restraints or protection of the U.S. Constitution. Although statements of justices indicate that the Supreme Court clearly expected this to be temporary until Congress adopted a status resolution policy, Congress has ruled Puerto Rico as a vestige of empire past, without a democratic form of government at the national level for 108 years.

For territories under the Northwest Ordinance, incorporation and eventual statehood were the only options. Modern principles of self-determination, under the U.N. Charter and human rights treaties to which the U.S. is a party, mean that Puerto Rico also has the option of becoming a separate sovereign nation through independence or free association.

However, the existence of additional options does not eliminate the problem created by extending U.S. citizenship but not the U.S. Constitution to Puerto Rico while it is a U.S. territory. Having denied protections of the U.S. Constitution to the U.S. citizens of Puerto Rico wrongfully for more than eight decades as a matter of domestic law, Congress needs to act immediately to correct the judicial error of the Balzac ruling in 1922 and sponsor a self-determination process satisfying both domestic and international standards.

LOCAL STATUS IDEOLOGY

It was not until 1950, that Congress authorized a local constitution allowing self-government only in local affairs not otherwise governed by federal laws, which are applied by Congress without consent of the citizens.

The controlling faction of the territory's "commonwealth" party asserts Puerto Rico is no longer a territory, and that adoption of the local constitution in 1952 established Puerto Rico as a "commonwealth" with national sovereignty. (Another

faction of the party, which favors free association does not subscribe to this fiction.) The current Governor is President of the party and he asserts that it is only a matter of time before the U.S. accepts that --

- Puerto Rico is not a U.S. territory, but a sovereign nation
- Federal laws, including federal wiretap and death penalty statutes, can apply in Puerto Rico only upon consent of the local government
- Federal law is no longer supreme, but co-equal to Puerto Rican law
- Puerto Rico has sovereign power to enter into international agreements in its own name and right as a nation, and conduct its own international relations
- U.S. citizenship and political union is guaranteed forever, as in the case of a state of the union
- Federal services, programs and benefits will increase and be guaranteed, but Puerto Ricans will always be exempt from federal income tax
- Puerto Rico will remain within the customs territory of the U.S., but enter into its own trade agreements with other nations
- Puerto Rico will have the power to limit the jurisdiction and operation of the federal court.
- The U.S. can permanently and irrevocably cede its sovereign power over Puerto Rico to the "commonwealth", and retain only such sovereign powers in Puerto Rico as may be delegated to the U.S. by Puerto Rico.
- Under the innocuous label "Development of Commonwealth", this virtual confederacy is unalterable by Congress in perpetuity without local consent
- Disputes between governments would be settled by sovereign-to-sovereign negotiations since federal law is no longer supreme.

Based on this status doctrine, the Governor asserts that Puerto Rico can have the benefits of both statehood and independence, and not be required to make the difficult choice between the two. Accordingly, the Governor argues that a choice between options recognized under federal law will create an "artificial majority", because statehood and independence supporters will "gang up" against the territory status that he insists Puerto Rico does not have.

The Governor proposes that the solution to the status question is for Congress to authorize a local convention to choose among statehood, independence, and a development of the current status – which he intends would be his "Development of Commonwealth" proposal.

He asserts that residents of Puerto Rico support "commonwealth" based upon a slight plurality in a 1993 local referendum, when less than a majority voted for a "Commonwealth" proposal that was not accepted by the Clinton Administration or in the Congress.

In 1998, another local status vote did not produce a majority vote for any status option. The current status as recognized under federal law was rejected by 99.9% of the voters.

These local votes demonstrate Puerto Rico does not have majority rule on status, and the U.S. citizens of the territory have effectively withdrawn consent to the current territory status.

The local constitutional convention proposal of the Governor is simply a diversionary tactic. It is not needed because Article VII, Section 2 of our local constitution already provides the exclusive procedure for calling a constitutional convention, with a more democratic procedure based on approval of a convention by a majority of voters.

To confuse, confound and befuddle his own party, the people of Puerto Rico, and Congress, the Governor's party has commissioned respected lawyers to cobble together the best possible legal arguments supporting the commonwealth party platform making Puerto Rico a nation permanently linked to the U.S. in a confederation.

I am attaching a series of scholarly commentaries which reject the legal briefs the Governor has presented to Congress and the White House, in a failed attempt to derail federal policy on Puerto Rico's status that is compatible with the Constitution and laws of the United States.

CONCLUSION

There are many reasons for Congress to authorize a federally sponsored plebiscite in Puerto Rico, but nothing is truly more important than the patriotism of the Puerto Rican men and women who have served with honor and distinction in every war sine we became citizens of the United States in 1917, 89 years ago. Puerto Ricans have fought in defense of our Nation, and the democratic principles of freedom for which it stands, since World War 1. They have fought, and many have made the ultimate sacrifice, on the battlefields of Europe and Africa, the Pacific and Korea, Vietnam and the Middle East, and recently in Afghanistan and Iraq. I regularly visit our wounded at Walter Reed, and am honored to witness first-hand their dedication and love for our Nation.

We have made a disproportionate contribution to our current effort on the War on Terrorism. We have earned our keep, and we deserve congressional consideration of our request for a fair and legitimate process to exercise our right to self-determination.

After 108 years of territorial status, Puerto Rico remains the longest standing territory in the history of the United States. Congress retains jurisdiction over the Puerto Rican status issue, so we have a constitutional responsibility to address the issue. Although Congress has consistently expressed its commitment to respect the right of self-determination of the people of Puerto Rico, Congress has never sponsored a plebiscite to allow the people of Puerto Rico to express themselves on their preference based on options that are compatible with the U.S. Constitution and basic laws and policies of the United States.

The only way to restore majority rule locally and achieve democracy and government by consent at the national level is to begin an orderly process of self-determination. I support the recommendation of the Task Force established by President Clinton and comprised of senior appointees of President Bush: a congressionally-provided for plebiscite on whether to seek a non-territory status. Only if a majority vote to seek a new status, would a second step be taken to choose among the options accepted by the federal government and specifically, by the Justice Department under Presidents George H.W. Bush and Bill Clinton, and the current President, as permanent in nature.

This is a moderate and measured approach to the issue. It is the minimum that Congress can -- and should -- do to fulfill its historical role under the U.S. Constitution to redeem the promise of America in Puerto Rico.

San Juan Star, *Viewpoint*, September 7, 2006, p. 55

Ideology won't salvage "enhanced commonwealth"

Dr. William Cleary

Critics of the White House report on Puerto Rico's status suggest the President's Task Force did not adequately consider legal theories about "mutual consent" or the "unalterable bilateral pact".

To the contrary, the record is clear that the President's Task Force consulted the Governor, his lawyers and lobbyists, as well as other advocates of "enhanced commonwealth". Non-partisan and ideologically unaffiliated experts were also consulted.

After listening carefully and weighing the legal arguments on both sides, the Task Force issued a report that concludes Congress can not create a legally binding or enforceable "vested right" to "commonwealth".

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In response, the legal "spin doctors" cite a federal legal case from 1810 about the enforcement of property rights "vested" under a contract with the federal government that has been fully executed. On the basis of that property rights case, it has been argued that a territory can acquire an enforceable "vested right" to a political status.

This is misleading, because, unlike vested property rights, Puerto Rico's status remains a political question vested in Congress by Article IX of the Treaty of Paris. As a result, Puerto Rico remains subject to plenary powers Congress retains under the territorial clause of the federal constitution, subject to "fundamental rights" that have not been clearly defined by Congress or the federal courts in a territorial law context.

However, a 1994 Department of Justice legal opinion on status concluded that,

> "...there could not be an enforceable vested right in a political status: hence...mutual consent clauses were ineffective because they would not bind a future Congress...Legislation relating to the governance of non-state areas does not create any rights or status protected...against repeal or amendment by subsequent legislation...[which} leads to the question of whether...a provision that legislation shall not be modified or repealed without the consent of the...non-state area has the effect of creating ...a specific status amounting to a property right within the meaning of the Due Process Clause...this question must be answered in the negative because...sovereign governmental powers can not be contracted away...and a specific political relationship does not constitute 'property' within the meaning of the Fifth Amendment".

Undaunted, advocates of a binding status compact continue to argue that one Congress can bind another from exercising the territorial power, and they even point to the "unalterable compact" language in the Northwest Ordinance of 1787 to support their opinions.

Ironically, the Northwest Ordinance is actually a statutory declaration of intent to incorporate territories existing at that time under the Articles of Confederation, and to admit states formed in the territories according to provisions of the ordinance. What was "unalterable" about the "compact" under the Northwest Ordinance was the U.S. assertion of sovereignty over the territories as a basis for unilateral incorporation and statehood.

In fact, the provisions of the Northwest Ordinance relating to territorial governments prior to statehood were not included in the six articles of the "unalterable compact". Rather, under Paragraph 12 of the ordinance, the local territorial governments were referred to as "temporary", which continues to be accurate today for Puerto Rico and all other territories.

The articles of "compact" that are "unalterable" begin at Paragraph 14 of the Northwest Ordinance, and Article 4 of this so-called "unalterable compact" expressly states that it was subject to "...such alterations...as shall be constitutionally made..." to the Articles of Confederation, and "...all acts and ordinances of the United States Congress".

Consistent with these provisions, in 1789 the first Congress of the United States amended the Northwest Ordinance without consent of the territories, to conform it to the new federal constitution. Thus, even the Northwest Ordinance, cited as a "compact...unalterable, unless by common consent", was by its express terms subject to alteration by Congress!

The weakness of legal arguments supporting "enhanced commonwealth" ideology is the reason it has been rejected by Congress for the last 50 years, not because the autonomy formula has not been understood and duly considered.

All Americans have a right to full and equal national citizenship, or nationhood. If denial of that right is to be continued under "commonwealth", at the very least that should be based on a clear majority vote consenting to continuation of the current status until a permanent status with fully equal and democratic rights of national citizenship is achieved.

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San Juan Star, *Viewpoint*, October 7, 2006, p. 14

Acevedo Vila is wrong on language rights

Dr. William Cleary

In his last state of the nation speech, Spanish Prime Minister Jose Luis Rodriguez Zapatero announced a policy to pay $1,300.00 scholarships to young Spanish citizens who participate in English language programs. Apparently Rodriguez Zapatero believes Spain's culture is not only strong enough to survive acquisition of English by the new generation, but that it will give Spain a competitive edge in the world economy.

In contrast, Gov. Acevedo Vila is using fear about language rights to defend his party's separatist political status ideology. For example, after the U.S. Senate adopted a declaration that "English is the common and unifying language of the United States", Acevedo Vila cited it as proof statehood leaders had "not been truthful with the people" by advocating the possibility of a Spanish-speaking state.

The Governor went so far as to taunt statehood leaders about the "fallacy" of statehood with Spanish in school and the courts. Apparently he failed to listen carefully to what happened in the U.S. Senate, because the final language policy in the immigration reform

bill, as offered by Sen. Ken Salazar of Colorado, deleted the provision making English an "official language".

Of even greater interest were the remarks of Sen. Jeff Bingaman from the State of New Mexico, supporting the Salazar amendment. Sen. Bingaman pointed out that New Mexico was a Spanish speaking U.S. territory in 1911, and that the vast majority of U.S. citizens in the territory spoke only or mostly Spanish, and significantly outnumbered those who spoke only or mostly English.

Yet, in 1912 New Mexico was admitted as a state of the union on an equal footing with all the other states. Ironically, those who spoke English were in the minority may have worried about discrimination based on language skills as much as those who spoke Spanish!

On the floor of the U.S. Senate during the recent debate on this issue, Sen. Bingaman described the situation in 1912 and the solutions found:

> "People were very concerned that the right of individuals in the state to speak either language would be preserved and that no one be discriminated against...We wrote a provision in our constitution which says [the rights of citizens]...shall never be restricted...on account of...inability to speak, read or write the English or Spanish language...The general rule in my state and in my state's constitution is that people shall not be discriminated against in their dealings with the government by virtue of their inability to speak English."

Contrary to Acevedo Vila's disdainful assertions, the language rights described by Sen. Bingaman were guaranteed, public schools and the courts included, by Art. VII, Sec 3 of the New Mexico state constitution, which read: "The right of any citizen of the state to vote, hold office, or sit upon juries, shall never be restricted...on account of...inability to speak, read or write the English or Spanish languages..."

Art. XII, Sec. 8 provided "The legislature shall provide for the training of teachers...so that they may become proficient in both the English and Spanish languages, to qualify them to teach Spanish-speaking pupils and students in the public schools...and...facilitate the teaching of the English language...to such pupils and students."

Sen. Bingaman is the senior Democrat on the U.S. Senate committee with jurisdiction over Puerto Rico's political status, and his remarks about the language rights under a state constitution and the 10th Amendment to the federal constitution are directly relevant to Puerto Rico. It is territorial status with limited self-government under "commonwealth" that leaves the territory without any defense against a federal language policy Congress makes applicable to Puerto Rico.

The New Mexico experience shows that a Spanish-speaking territory can make the transition to statehood without loss of Spanish language rights. However, in recent years

New Mexico and other states also have adopted the English-plus policy, promoting English proficiency to open up doors of economic opportunity to all citizens.

When both state governments in America and the Government of Spain recognize the importance of English and Spanish language empowerment, the governor's use of language to exploit social fears rooted in the colonial experience looks like political manipulation, to keep his people from leaving the colonial legacy of "commonwealth" behind.

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"Dependent sovereign" status no solution

Dr. William Cleary

In the course of the political status debate in Puerto Rico, it has been suggested that U.S. citizens in Puerto Rico look to the political status of the American Indian tribes to address Puerto Rico's current undemocratic status under the sovereignty of Congress.

It would be hard to imagine a worse fate for a U.S. territory than to adopt a "special dependent sovereign" model based on the federal relations with native tribes, only to end up living on a self-imposed "reservation" under federal power and still without equal civil rights.

The status of Indian tribes under the Indian Commerce and Treaty Clauses of the U.S. Constitution is subject to the same kind of unrestrained Congressional power as unincorporated territory status under the Territorial Clause. However, there are obvious reasons Indian tribe status is not a model for territories to emulate, and vice versa.

For example, individually Native Americans have the option of full democratic participation and equal citizenship under the federal constitution, rights not available in the territories. On the other hand, unincorporated territories have the options of independence, free association or statehood to end dependent status, choices not available to Indian nations.

So while both territories and Indian nations exist in conditions of encumbered sovereignty, trading places is no solution for territories or the Indian peoples.

Ignoring these realities, it has been argued that the concept of Indian sovereignty can be a model for a so-called "permanent autonomic covenant". This is really just a variation of the "enhanced commonwealth" formula, pretending commonwealth can be made non-territorial by an irrevocable gift of autonomy from Congress.

Advocates of this status theory cite the 2004 U.S. Supreme Court ruling in *U.S. v. Lara* to support the "dependent sovereign" theory of autonomy. Unfortunately, this misinterprets the case as a clarion call for all "special dependent sovereigns" under the U.S. flag to rejoice in the plenary power of Congress to benevolently determine their destiny.

The flawed assumption is that Congress can use its powers to confer a permanent form of autonomy that makes commonwealth democratic and non-territorial. The hard truth is that Congress can not selectively or partially cede federal sovereign power over territories, or Indian tribes.

Rather than refuting this, the *Lara* case recognizes the power of Congress to grant autonomy, *and to modify it, expand or reduce it, or take it away!* The one thing the ruling in *Lara* makes clear is that Congress can not dispose of its plenary power over such dependencies by statute or agreement, unless it also disposes of U.S. sovereignty.

The *Lara* ruling specifically states that earlier decisions defining the degree of local autonomy and sovereignty for tribes "*...did not set forth constitutional limits that prohibit Congress from...taking actions that modify or adjust the tribe's status.*"

Based on a misreading of the *Lara* case, it has been argued that dependent sovereign status, with autonomy subject to Congressional supremacy, is the best Puerto Rico can do.

The defeated Indian nations had no choice but to accept that fate, but Indian nation sovereignty is not a triumph of democracy and self-determination.

Asking your conqueror or colonial master to bestow symbolic sovereignty is a position of weakness, not strength.

In Puerto Rico's own colonial experience, Spain granted the so-called Charter of Autonomy, only to cede Puerto Rico to the United States without local consent! So much

for autonomy bestowed on "dependent sovereigns" at the pleasure of a supreme sovereign power.

The U.S. citizens of Puerto Rico deserve the sovereign rights of a state or nation, not a revocable "gift" of local self-government.

Puerto Rico was annexed in 1899, and the issue is when annexation will end based on full government by consent. That can come through statehood, as it did for Hawaii; independence, as in the case of the Philippines; or free association, as in the case of Micronesia.

Puerto Rico should reject the call to return to the "reservation", or the plantation, or whatever else may be proposed other than full and equal national citizenship.

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